Supreme Court, U.S.
FILED

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No. _____ 041270 SEP 1 - 2004

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In The
Supreme Court of the United States

JOSHUA RIOS AND MARY CANALES,

Petitioners,

v.

DOYLE WAYNE SCOTT, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE; GARY JOHNSON, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE; JANE CATHERINE COCKRELL, INDIVIDUALLY AND IN HER CAPACITY AS DIRECTOR OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE; LESLIE WOODS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS REGION II DIRECTOR OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE; ROY A. GARCIA, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SENIOR WARDEN OF THE COFFIELD UNIT OF THE INSTITUTIONAL DIVISION OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE; AND PATTI SIPPEL,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. On or before March 16, 2000, was there a clearly established Eighth Amendment right requiring an armed prison guard to immediately intervene when an armed inmate is attacking an unarmed, handcuffed inmate?

2. On or before March 16, 2000, should reasonable supervisory prison officials have known that inadequate staffing, cell searches, training, and failure to prevent inmate assaults violated the Eighth Amendment to the United States Constitution?

LIST OF PARTIES TO THE PROCEEDINGS

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Fifth Circuit.

TABLE OF CONTENTS

	Page
Questions Presented	i
List Of Parties To The Proceedings	ii
Table of Contents	iii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	1
Constitutional Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Writ	12
Conclusion	15
Appendix:	
A. Opinion of the Court of Appeals	App. 1
B. Opinion of the Trial Court	App. 4
C. Final Judgment of the Trial Court	App. 18

TABLE OF AUTHORITIES

Page

CASES

Cortes-Quinones v. Jimenez-Nettleship, 842 F.2d 556 (1st Cir.), cert. denied, 488 U.S. 823 (1988) 12

DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189 (1989) 12

Estelle v. Gamble, 429 U.S. 97 (1976) 13

Farmer v. Brennan, 511 U.S. 825 (1994) 12, 13, 14

Hale v. Rallapoosa County, 50 F.3d 1579 (11th Cir. 1995) 13

Hudson v. Palmer, 468 U.S. 517 (1984) 12, 13

Rhodes v. Chapman, 452 U.S. 337 (1981) 13

Street v. Corrections Corporation of America, 1996 FED App. 0387P (6th Cir. 1996) 13

Trop v. Dulles, 356 U.S. 86 (1958) 13

Wilson v. Seiter, 501 U.S. 294 (1994) 12

CONSTITUTIONAL AUTHORITIES

Fourth Amendment, United States Constitution 2

Fifth Amendment, United States Constitution 2

Eighth Amendment, United States Constitution 2, 12, 13

Fourteenth Amendment, United States Constitution 2

STATUTES

28 U.S.C.A. Section 1254(1) 2

28 U.S.C.A. Section 1291 2

TABLE OF AUTHORITIES – Continued

Page

28 U.S.C.A. Section 1331 1

42 U.S.C.A. Section 1983 ..... 1, 3

RULES

Rule 13, Rules of the Supreme Court of the United States 2

PETITION FOR WRIT OF CERTIORARI

Joshua Rios and Mary Canales, Petitioners herein, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on June 3, 2004.

OPINIONS BELOW

The June 3, 2004 opinion of the Court of Appeals, whose judgment is herein sought to be reviewed, is not published and is found under docket number 03-41088. The opinion is reprinted in the separate Appendix to this Petition, pp. 1-3. The prior memorandum opinion of the Magistrate, which was adopted by the United States District Court for the Eastern District of Texas, was filed on May 28, 2003, is not published and is found under docket number Civil Action NO. 6:02cv413. A copy of the Report and Recommendation of United States Magistrate Judge On Defendant's Motion For Summary Judgment is reprinted in the separate Appendix to this Petition, pp. 4-17. The Final Judgment of the trial Court was entered on July 28, 2003 and is reprinted in the separate Appendix to this Petition, p. 18.

JURISDICTION

The trial court's jurisdiction in this case derives from authority of 28 U.S.C.A. Section 1331, which provides that actions involving federal question or brought pursuant to 42 U.S.C.A. Section 1983 may be heard in the District Court. Petitioners brought action against Respondents on

behalf of their deceased relative alleging violations of the deceased's constitutional rights under the Fourth, Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

The Court of Appeals' jurisdiction to render the opinion arises under from 28 U.S.C.A. Section 1291.

The jurisdiction of the Supreme Court to hear this Petition arises under 28 U.S.C.A. Section 1254(1).

The Final Judgment of the trial court in this case was signed on July 28, 2003. Clerk's Record p. 443. Notice of appeal was required to be filed on or before August 27, 2003, but was actually filed on August 1, 2003, in accordance with Rules 3 and 4, F.R.A.P. Clerk's Record p. 443. The Petition is being filed within ninety days of Order Affirming the Judgment entered by the Fifth Circuit Court of Appeals on June 3, 2004. Supreme Court Rule 13.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional issues involve violations of the deceased's constitutional rights under the Eighth Amendment, as extended to state officers through the Fourteenth Amendment to the United States Constitution. The Eighth Amendment provides that "Excessive bail shall not be required, nor excessive fines imposed, ***nor cruel and unusual punishment be inflicted.***" (emphasis added).

STATEMENT OF THE CASE

Nature of the Case

This case arises from the stabbing death of Rolando Rios, an inmate in an administrative segregation section of the Coffield Unit of the Texas Department of Criminal Justice, Institutional Division, by another inmate, Antonio Lara. Appellants contend that each Appellee was aware of information from which he or she could infer that there was a substantial risk of serious harm to inmates in Rolando Rios' position and that each person acted with deliberate indifference to the safety needs of Rios, and the other similarly situated inmates, at the Coffield Administrative Segregation Unit. Each Appellee violated Rios' right to be free from cruel and unusual punishment as guaranteed by the Eighth Amendment to the United States Constitution.

The Course of Proceedings

Suit was filed on March 12, 2002, by Joshua Rios, Rolando Rios' son, and Mary Canales, Rolando Rios' mother, alleging that the named prison officials were liable for the wrongful death of Rolando Rios on March 16, 2000. The Complaint alleged that the prison officials violated the rights of Rios guaranteed by the Fourth, Fifth, Eighth and Fourteenth Amendments to the United States Constitution. The suit was brought pursuant to 42 U.S.C.A. Section 1983, among other grounds not relevant to this Petition, seeking equitable relief and damages for the injury and loss of life that occurred to Rolando Rios, the father of Joshua Rios and the son of Mary Canales.

After summary judgment was considered by submission, a Report and Recommendations of Magistrate Judith

K. Guthrie was filed on May 28, 2003. Appendix, pp. 4-17. The Report, with Objections and Response, was forwarded to the Trial Judge on July 25, 2003, who adopted the Report and Recommendations and entered Final Judgment on July 28, 2003. Appendix, p. 18.

Relevant Facts

Rolando Rios was a 41 year old man sentenced to the Institutional Division of the Texas Department of Criminal Justice to serve a ten-year sentence for aggravated robbery. Record p. 254 (all references to "Record" refer to the District Clerk's Record that was filed with the Court of Appeals). Rios was a confirmed member of a gang known as "The Texas Syndicate." Record p. 254. Because of his gang affiliation and his underlying offense, Rios was confined to the Administrative Segregation housing of the Coffield Unit at the time he was assaulted and murdered by Antonio Lara on March 16, 2000. Record p. 254.

Antonio Lara was being monitored as a suspected member of a gang called "Hermanos Pistoleros Latinos" Record p. 254. Prior to March 16, 2000, all Appellees were **notified of possible conflicts between the "Hermanos Pistoleros Latinos" and the "Texas Syndicate"** and the housing of all members was reviewed. (emphasis added). Record pp. 420-421.

"All Coffield Unit staff members, (security and non-security) were notified of the possible conflicts." (emphasis added). Record p. 421 (top of page).

Additional evidence of the pending attack comes from the testimony by affidavit of Richard Smith: "The man who killed Roland is named Lara, but, his nickname is

"Barney" I know who he is because he was in a gang called the "Pistoleras." Roland had been a member of a gang called the "Texas Syndicate." **He told me for about a month before this happened that he was supposed to be moved any day to a different wing because there "was a war on" and a member of another gang was on their wing.** This created a very dangerous situation for him so he was being real quiet" (emphasis added). Record pp. 362-363. **This testimony is important because it indicates that Rolando Rios had informed prison officials that he was in danger because of the presence of a member of a different gang on his wing and the prison officials had, apparently, assured him that he would be moved "any day."** (emphasis added).

The Coffield Unit had been allowed to operate consistently understaffed by admission of the officials themselves. On the day of the attack, March 16, 2000, the Unit was 112 correctional officers short of its allocation of 726 positions. Record p. 421. This admission corroborated the claims of Richard Smith who testified by affidavit:

> . . . they [the guards] usually have only one person in the picket on each of the four levels. But, each person is watching five or six wings from the same picket at the same time. So, there are many times when a guard is distracted in the picket by activity on one of the wings and there is a lot of time during which the picket guard is not watching our wing. Anything could happen and the picket wouldn't know about it.

Record p. 366.

Thomas A. Rossaza, an expert in management of correctional programs, attributes the understaffing to the cause of the attack, testifying by affidavit that:

> Allegations in the Complaint include failure to protect Mr. Rios, who was defenseless in the face of the Lara attack. Administrative segregation (Ad Seg) units are designed for prisoners who are unfit for general population since they often include gang members, behavioral problem inmates or predators. In most cases these prisoners represent those who need the greatest deal of control and supervision and are normally locked down for twenty-three hours daily with one hour outside the cell for exercise. Before prisoners are let out of their cells they are normally maximally controlled by being handcuffed, sometimes tethered with a leather strap attached to the cuffs for greater control, and they are escorted by two or more officers who may wear body protective gear.

Record p. 369.

These conclusions are also underpinned with the testimony by affidavit of Steve Murrell, a witness to the attack:

> On March 16, 2000, I was in the day room on the third floor when I saw Roland Rios being escorted by one female officer named Sippel who was carrying a night stick/baton. She weighs about 100 pounds. **There were supposed to be two guards on the floors – one for the two upper levels and one for the two lower levels. However, they were understaffed and they were almost always one guard short on our floors** . . . Roland was handcuffed behind

> his back. She was the only guard working on the "run" that day.

(emphasis added) Record pp. 357-358.

Murrell continues with the events of the attack:

> I saw Sippel bringing Roland back from the shower heading toward the stairs. It was about 7:30-8:00 a.m. I could see them from the day room. For some reason, she took Roland from his cell on the fourth floor to the shower on the third floor. There is a landing between the third and fourth floor on the stairs (which are made of metal) and they had reached the landing. I heard screaming coming from there which was Sippel. I turned around and saw a guy, whose nickname is "Barney," stabbing Roland in the back with something in his left hand. It was metallic. He stabbed Roland repeatedly, very quickly. They were about ten to twelve feet away from me outside the day room. I could see Sippel down in the corner screaming for a few moments. Then, she realized what was happening and she got up and ran away down the stairs. She never pulled her baton or tried to stop him from stabbing Roland. She was down the stairs before Barney.

Record p. 359.

Prior to the March 16, 2000 murder, there were inadequate cell inspections and searches by the prison official's own admission:

> The requirement as mentioned in the Administrative Segregation Plan and explained in Post Order 07, that each shower, dayroom and recreation yard is searched prior to and after each use,

> is not being met. . . . A review of the Administrative Segregation Activity Log revealed that there are excessive periods of time between cell searches. Offender Lara's cell had not been searched in 11 days . . . Documentation did not support validation of routine cell searches.

Record p. 422.

This admission by the prison officials corroborated the testimony by affidavit of Richard Smith:

> And a few days before this [the attack on Rios] happened, somebody sent me a note which told me to be careful because somebody was cutting downstairs at night. The gangs have been using this filing method to break out of cells for years all over TDC. I have seen kits which consist of a hacksaw blade, handcuff key, and a knife. . . . These get passed from cell to cell because most of the time we are not being watched. Usually, there is nobody in the picket watching the runs. So, when guards are not present, these types of things get passed from cell to cell. These blades are usually hidden in the mattress and so are shanks. . . . We get a shakedown about every four months when they shut everything down and search everybody's cell for weapons and contraband. But, they are supposed to check your cell every time you go out of your cell, for showers, recreation, for any reason. The guards are not doing this every time that they are supposed. These searches have only been done sporadically. They are supposed to hit the cell doors with a rubber mallet with each shift change to see if any doors are loose in case they have been cut on. But, they had not been doing that like they were supposed to. Ms. Sippel had checked all the middle of the doors that morning but not the bottoms of the

> doors. She also did not use the mirror device that morning either. They have a mirror device which they are supposed to use to look under the doors to see if anyone has been cutting on the door and they never used the device – except for about two times since September 1999. They started using the mirror after this murder happened.

Record pp. 364-365.

The prison officials were fully aware that inmates had been cutting the "mild steel door guides" that Lara cut through in this incident as far back as 1986-87:

> The cell breach was not a result of a lock malfunction. The door system in P-2 has been modified two times since original construction. In 1986-87 the door systems in P-1 and P-2 were modified by the manufacture to provide a fully functional motorized system. P-3 and P4 were modified in 1994-95 to have a kick release type of system. **The mild steel door guides in P-2 were replaced two years ago with stainless steel guides. This modification was made as a result of offenders cutting the guides and exiting the cells.** This modification was not made to P-1 because the offenders housed in that section were not displaying that type of behavior. Recommendations. The Coffield Unit should replace the existing stainless steel door guides with heavier gauge stainless steel member and replace the mild steel door guide receivers with a stainless steel member. This modification should also include attaching a piece of 'L' shaped angle iron to the bottom of the front of the door for additional cell door support. These modifications should be made to P-1 and P-2 cellblocks.

(emphasis added) Record p. 424.

What was discovered by the prison officials when the contraband searches (that should have been conducted upon the "notification of possible conflicts between the HLP (Hermados Latinos Pistoleros) and the TS (Texas Syndicate) group" [Record p. 420] alert was given to "all staff members [security and non-security]" [Record p. 421]), was a multitude of weapons in contraband searches conducted after the assault:

> On 3-21-00 two weapons were found. . . . One weapon was 5 inches long and the other weapon was 5½ inches long . . . On 3-23-00 three weapons were found in cell v-120 on the top bunk, concealed in a sock under the mattress . . . The weapons were round steel rods sharpened to a point on one end and had cloth tied to the other end for a handle. Two of the weapons were 8½ inches long and the third weapon was 9¾ inches long . . . On 3-23-00 a 9 inch long, 3¼ inch wide, flat metal weapon was found in the y-Wing dayroom. . . . On 3-25-00 a red handle eating utensil, sharpened to a point at one end was found in a A-side shower . . . On 3-27-00 a homemade weapon was found in a light fixture on z-Wing . . . The weapon was approximately 9¼ inches long and was a flat piece of metal sharpened to a point, and string wrapped around one end for a handle . . . On 3-28-00 A 6 inch long metal welding rod sharpened to a point on one end was found in the possession of offender . . . On 3-29-00 a 9½ inch long round steel rod, sharpened to a point on one end was found on the window seal on W-Wing . . . On 3-30-00 A search of the outside recreation yard was conducted. 3 homemade weapons were found, 2 were approximately 7 inches long and one was approximately 6⅛ inches long sharpened to a point on one end . . . On 4-1-00 Two

> nails approximately 5 inches long was found in the Z-Wing door panel above Z-221 cell. . . . On 3-16-00 Offender Lara . . . with a homemade weapon approximately 10 inches long and sharpened to a point at one end, and had gray cloth at the other end used for a handle.

Record pp. 350-352.

Officer Patti Sippel is faulted by the expert, Rosazza, when "the officer ran away from the defenseless Rios when Lara attacked. When Rios' ability to defend himself was taken away by the officers, there was a duty by the officer to provide for his safety in the unit. At the least, Officer Sippel should have been trained to intervene minimally to protect her ward." Record p. 370.

Finally, expert Rosazza concludes:

> . . . the failure to adequately staff I-Wing-2 for escorts, the failure to provide safekeeping to **Mr. Rios who was defenseless,** the failure to control contraband and the failure to inspect cells, and the failure to separate Mr. Rios from known rival gang members are breaches of the duty to protect Mr. Rios when he was stabbed to death. **The practices of correctional staff in I-Wing-2 are contrary to long-standing practices and industry standards which are intended to provide a safe environment.**

(emphasis added) Record p. 371.

The Rulings Below

The trial court found that Officer Patti Sippel and the supervisory officials were entitled to qualified immunity because there was no evidence that they had violated a

clearly established constitutional right. See Appendix, p. 15.

The Court of Appeals agreed with the trial Court and concluded that the officers had not violated a clearly established constitutional right, citing *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). See Appendix, p. 3.

REASONS FOR GRANTING THE WRIT

Certiorari Should Be Granted to Resolve Conflicts Among the Lower Courts and to Clarify the holding in *Farmer v. Brennan.*

The holding of the trial Court and the Court of Appeals appears to conflict with the language set forth in *Farmer v. Brennan,* 511 U.S. 825, 830 (1994), by Justice Souter: "In particular, as the lower courts have uniformly held, and as we have assumed, 'prison officials have a duty . . . to protect prisoners from violence at the hands of other prisoners.' [quoting] *Cortes-Quinones v. Jimenez-Nettleship,* 842 F.2d 556, 558 (C.A. 1) (internal quotation marks and citation omitted), cert. denied, 488 U.S. 823 (1988); see also *Wilson v. Seiter,* 501 U.S. 294, at 303 (describing 'the protection [an inmate] is afforded against other inmates' as a 'condition of confinement' subject to the strictures of the Eighth Amendment.). Having incarcerated 'persons [with] demonstrated proclivities for antisocial criminal, and often violent, conduct,' *Hudson v. Palmer,* [468 U.S. 517 (1984)] supra, at 526, having stripped them of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course. Cf. *DeShaney* [*v. Winnebago County Dept. of*

Social Services, 489 U.S. 189 (1989)] supra, at 347; *Estelle* [*v. Gamble,* 429 U.S. 97 (1976)] supra, at 103-104. Prison conditions may be 'restrictive and even harsh,' *Rhodes* [*v. Chapman*, 452 U.S. 337 (1981)] supra, at 347, but gratuitously allowing the beating or rape of one prisoner by another serves no 'legitimate penological objective,' *Hudson v. Palmer,* [468 U.S. 517 (1984)] supra, at 548 (Stevens, J., concurring in part and dissenting in part), any more than it squares with 'evolving standards of decency,' *Estelle,* supra, at 102 (quoting *Trop v. Dulles,* 356 U.S. 86, 101 (1958) (plurality opinion)). Being violently assaulted in prison is simply not 'part of the penalty that criminal offenders pay for their offenses against society.' *Rhodes,* supra, at 347." It would appear from this language that a constitutional right to protection from other inmates was clearly established by 1994.

The Fifth Circuit appears to disagree with the Eleventh Circuit holding in *Hale v. Rallapoosa County,* 50 F.3d 1579, 1583 (11th Cir. 1995), which found there was potential Eighth Amendment liability for a Sheriff responsible for a jail where "inmate-on-inmate violence occurred regularly when the jail was overcrowded."

The Fifth Circuit appears to disagree with the Sixth Circuit holding that a risk of violence specific to the inmate/plaintiff is not required by *Farmer v. Brennan* in the case of *Street v. Corrections Corporation of America,* 1996 FED App. 0387P (6th Cir. 1996).

The holding of the Court of Appeals in this case finding no constitutional violations by the supervisory personnel appears to conflict with the language in *Farmer v. Brennan,* 511 U.S. 825, 841 (1994), where Justice Souter wrote: "For example, if an Eighth Amendment plaintiff

presents evidence showing that a substantial risk of inmate attacks was longstanding, pervasive, well-documented, or expressly noted by prison officials in the past, and the circumstances suggest that the defendant official being sued had been exposed to information concerning the risk, and thus 'must have known' about it, then such evidence could be sufficient to permit a trier of fact to find that the defendant official had actual knowledge of the risk . . . Nor may a prison official escape liability for deliberate indifference by showing that, while he was aware of an obvious, substantial risk to inmate safety, he did not know that the complainant was especially likely to be assaulted by the specific prisoner who eventually committed the assault." *Id.* at 841.

If the facts admitted against the Respondents at trial do not set forth constitutional violations, then the holding in *Farmer v. Brennan* needs to be clarified. As it stands with Petitioner's case, armed prison guards do not have a constitutional duty to provide protection for an inmate that they, themselves, chained and shackled and made defenseless.

CONCLUSION

Wherefore, Petitioners respectfully pray that a writ of certiorari be granted.

Respectfully Submitted,

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APPENDIX

Contents Page

Opinion of the Fifth Circuit Court of Appeals .....App. 1

REPORT AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.....App. 4

JUDGMENT of the trial court .....App. 18

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Charles R. Fulbruge III
Clerk

No. 03-41088

JOSHUA RIOS; MARY CANALES, Plaintiffs-Appellants, versus DOYLE WAYNE SCOTT, Etc; ET AL; Defendants, DOYLE WAYNE SCOTT, Individually and In His Official Capacity as Executive Director of the Texas Department of Criminal Justice; GARY JOHNSON, Individually and In His Official Capacity as Executive Director of the Texas Department of Criminal Justice; JANE CATHERINE COCKRELL, Individually and In Her Official Capacity as Director of the Texas Department of Criminal Justice; LESLIE WOODS, Individually and In His Official Capacity as Region II Director of the Texas Department of Criminal Justice; ROY A GARCIA, Individually and In His Official Capacity as Senior Warden of the Coffield Unit of The Institutional Division of the Texas Department of Criminal Justice; PATTI SIPPEL Defendants-Appellees

Appeal from the United States District Court
For the Eastern District of Texas
USDCNo. 6:02-CV-413

(Filed June 3, 2004)

Before KING, Chief Judge, and REAVLEY and EMILIO M. GARZA, Circuit Judges. PER CURIAM:*

Joshua Rios and Mary Canales ("the Relatives") appeal from the district court's grant of summary judgment based

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

on qualified immunity. They filed suit under 28 U.S.C. § 1983 and state law against the defendants, Patti Sippel, a correctional officer at the prison where their relative Rolando Rios ("Rios") was incarcerated, and several supervisory officials. The Relatives alleged that Sippel and the supervisory officials violated Rios's Fourth, Fifth, Eighth, and Fourteenth amendment rights when they failed to protect Rios from lethal attack by a fellow prisoner. The district court adopted the findings and conclusions of the magistrate judge and granted the defendants' summary judgment motion as to the federal claims, finding that the defendants were entitled to qualified immunity. We agree and affirm the district court decision.

Rios was stabbed to death by fellow inmate Antonio Lara while they were confined in administrative segregation. Rios, a confirmed gang member, was handcuffed and being escorted back to his cell after a shower by Officer Patti Sippel. Lara, a suspected gang member at the time of the attack, broke out of his cell and stabbed Rios with a weapon. Officer Sippel, armed only with a baton, ran to get help. Rios died as a result of his stabbing wounds.

We review the district court's grant of a summary judgment motion *de novo*. *See Flock v. Scripto-Tokai Corp.*, 319 F.3d 231, 236 (5th Cir. 2003). A summary judgment motion is properly granted when, viewing the evidence in the light most favorable to the nonmovant, the record indicates that there is "no genuine issue as to any material fact and that the moving party is entitled to judgment ___ Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4. as a matter of law." FED. R. CIV. P.56(c); *CelotexCorp. v. Carett*, 477 U.S. 317, 322 (1986). When a defendant government official whose position involves the

exercise of discretion moves for summary judgment based on qualified immunity, "it is the plaintiffs burden to demonstrate that all reasonable officers similarly situated would have then known that the alleged acts of the defendants violated the United States Constitution." *Thompson v. Upshur County, TX*, 245 F.3d 447, 459-60 (5th Cir. 2001).

Officer Sippel is entitled to qualified immunity because there is no clearly established constitutional right for an officer to immediately intervene when an armed inmate attacks another inmate, as the officer may need to call for backup or seek to avoid her own serious injury. *See e.g. Patmon v. Parker*, 3 Fed. Appx. 337 (6th Cir. 2001); *Winfield v. Bass*, 106 F.3d 525 (4th Cir. 1997); *Prosser v. Ross*, 70 F.3d 1005 (8th Cir. 1995); *Payne v. Collins*, 986 F.Supp. 1036 (E.D. Tex. June 25, 1997). Accordingly, the Relatives could not meet their burden to demonstrate that all reasonable officers similarly situated would have then known that the failure to intervene violated the Constitution. The district court correctly granted summary judgment in favor of Officer Sippel.

The supervisory officials are also entitled to qualified immunity because the Relatives have not shown that reasonable officials would know that the supervisory officials' conduct violated the Constitution. A prison official violates the Eighth Amendment only when that official is deliberately indifferent to the safety needs of an inmate. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). Here, there was no evidence that the supervisory officials were deliberately indifferent to inadequate staffing, cell searches, training or potential gang conflict. Accordingly the district court's grant of summary judgment in favor of the defendants is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

JOSHUA RIOS, ET AL. S

v.

CIVIL ACTION NO. 6:02cv413

DOYLE WAYNE SCOTT, ET AL. S

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

(**FILED** MAY 28, 2003)

The above-styled lawsuit was filed on March 12, 2002 pursuant to 42 U.S.C. § 1983. The case was referred to the undersigned in accordance with 28 U.S.C. § 636(b)(1). On March 21, 2003, Defendants filed a Motion for Summary Judgment (docket #35). For the reasons assigned below, the Court finds that the Motion for Summary Judgment should be granted.

Background

This case was filed in the Beaumont Division on March 12, 2002, and transferred to the Tyler Division on August 22, 2002. The case concerns the March 16, 2000 stabbing of Rolando Rios, an administrative segregation inmate at the Coffield Unit of the Texas prison system. Rios was stabbed by another administrative segregation inmate named Antonio Lara while Rios was being escorted from the shower back to his cell by Officer Patti Sippel.

Rios was handcuffed while being escorted back to his cell. Officer Sippel had taken Rios, an inmate housed on the fourth floor, to a shower on the third floor. Lara was housed on the third floor. Having filed through a metal brace on his cell door, Lara got out of his cell and attacked Rios as Officer Sippel was escorting him back to the fourth floor. Lara repeatedly stabbed Rios with a home-made weapon, commonly referred to as a "shank." Officer Sippel ran away and called for assistance. After stabbing Rios, Lara returned to his cell. The incident occurred around 9:10 a.m. After other officers arrived on the scene, Rios was taken to the medical department. Rios suffered cuts to the right center chest, the right center chest near the nipple area, the right upper back, the right axillia (under arm) and the mid left back area. Dr. Kuykendall pronounced Rios dead at 9:38 a.m. The parties do not dispute these facts.

This lawsuit was filed by Rios' son, Joshua Rios, and Rios' mother, Mary Canales. The Defendants are Doyle Wayne Scott, former Executive Director of the Texas Department of Criminal Justice ("TDCJ"), Gary Johnson, Executive Director of the TDCJ,[1] Jane Cockrell, Director of the TDCJ-ID,[2] Leslie Woods, Region II Director of TDCJ-ID, Roy Garcia, Senior Warden of the Coffield Unit, and Patti Sippel, a correctional officer at the Coffield Unit at the time of the stabbing. The Plaintiffs assert that the Defendants' failure to follow security guidelines and failure to protect Rios violated his Fourth, Fifth, Eighth

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[1] Johnson was the Director of the TDCJ Institutional Division ("TDCJ-ID") at the time of the stabbing.

[2] Cockrell was the Deputy Director of Security for the TDCJ at the time of the stabbing to the Texas Tort Claims Act, as well as state-law claims of wrongful death, negligence and gross negligence.

and Fourteenth Amendment rights, in violation of 42 U.S.C. § 1983. More specifically, the Plaintiffs submit that the Defendants acted with deliberate indifference to Rios' safety/failed to adequately select, screen, educate, train and supervise prison guards and filed to properly discipline prison guards for violations. The Defendants allegedly violated Rios' right to be free from cruel and unusual punishment and breached their duty to provide him a safe and secure environment. The Plaintiffs also assert that these facts state a claim pursuant to the Texas Tort Claims Act, as well as state-law claims of wrongful death, negligence and gross negligence.

The Defendants filed a Motion for Summary Judgment. The Defendants first argue that the claims against them in their official capacities are barred by the Eleventh Amendment because these claims are essentially claims made against the state. In addition, with respect to the claims made against the Defendants in their official capacities, the Defendants argue that the state is not a "person" that may be sued under 42 U.S.C. § 1983. To the extent the Plaintiffs assert claims against the Defendants in their individual capacities, the Defendants assert that they are entitled to qualified immunity. The Defendants argue that the Plaintiffs cannot succeed on their claim pursuant to the Texas Tort Claims Act because they have sued employees, rather than a governmental unit, and, secondarily, because the claims asserted by the Plaintiffs do not involve a use of property as required for a waiver of the state's immunity. Finally, the Defendants submit that the Plaintiffs claims for wrongful death, negligence and gross negligence must fail because they were acting in the course and scope of their employment and are entitled to official immunity.

The Plaintiffs filed a response to the Motion for Summary Judgment. The Plaintiffs explain that they are suing the state for injunctive relief to put an end to inadequate training and staffing of correctional officers in the administrative segregation section of the Coffield Unit, as well as the poor maintenance of these areas. The Plaintiffs argue that there should have been two guards with batons escorting Rios to the shower and that, due to understaffing and a lack of training, the guards on the administrative segregation unit failed to check doors and search for contraband regularly. With regard to the claims against the Defendants in their individual capacities, the Plaintiffs argue that they showed deliberate indifference to Rios' safety because they knew about prior assaults, yet failed to take routine safety precautions in administrative segregation, such as having two guards escort inmates, searching for contraband randomly and frequently, and checking door tracks for damage. Moreover, the Plaintiffs argue that the Defendants knowingly placed Rios on a cell block with a rival gang member. The Plaintiffs submit that the Defendants are liable under the Texas Tort Claims Act because Officer Sippel failed to properly use her baton and the Defendants collectively failed to provide a safe and secure cell door that would have prevented Lara from escaping his cell. Finally, the Plaintiffs assert that the Defendants are liable under state law theories of wrongful death, negligence and gross negligence because they acted in bad faith concerning the operation of administrative segregation at the Coffield Unit.

Summary Judgment Standard

Rule 56(c) of the FED.R.Civ.P. provides that the Court may only grant a motion for summary judgment when

there is no genuine issue of material fact and the moving party is entitled to summary judgment as a matter of law. The party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2553 (1986). The moving party, however, "need not negate the elements of the nonmovant's case," *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en bane). The movant's burden is only to point out the absence of evidence supporting the nonmoving party's case. *Stults v. Conoco, Inc.*, 76 F.3d 651, 655 (5th Cir. 1996). Once the moving party makes a properly supported motion for summary judgment, the nonmoving party must look beyond the pleadings and designate specific facts in the record showing that there is a genuine issue for trial. *Id.* Neither "conclusory allegations" nor "unsubstantiated assertions" will satisfy the nonmovant's burden. *Id.*

Summary judgment is inappropriate if the evidence before the court, viewed as a whole, could lead to different factual findings and conclusions. *Honore v. Douglas*, 833 F.2d 565 (5th Cir.1987). The district court must look to the full record, including the pleadings, affidavits, and depositions. *Williams v. Adams*, 836 F.2d 958, 961 (5th Cir. 1988). Under this standard, fact questions are considered with deference to the nonmovant. *Reid v. State Farm Mutual Automobile Insurance Co.*, 784 F.2d 577, 578 (5th Cir. 1986). The evidence of the nonmovant is to be believed and all inferences are to be drawn in his favor. *Anderson v.*

Liberty Lobby, 477 U.S. 242, 255, 106 S.Ct. 2506, 2513 (1986). The court resolves factual controversies for purposes of summary judgment in favor of the nonmoving party, but only when there is an actual controversy, that is, when both parties have submitted evidence of contradictory facts. *Little v. Liquid Air Corp.*, 37 F.3d at 1075. The Court does not, however, in the absence of any proof, assume that the nonmoving party could or would prove the necessary facts. *Wallace v. Texas Tech University*, 80 F.3d 1042, 1048 (5th Cir. 1996) (citing *Little v. Liquid Air Corp*, 37 F.3d at 1075).

An issue is "genuine" if the evidence supporting its resolution in favor of the party opposing summary judgment, together with any inference in such party's favor that the evidence allows, would be sufficient to support a verdict in favor of the party. *St. Amant v. Benoit*, 806 F.2d 1294, 1297 (5th Cir. 1987). A "material fact" is one that might affect the outcome of the suit under governing law. *Anderson v. Liberty Lobby*, 477 U.S. at 248, 106 S.Ct. at 2510.

Discussion and Analysis

Eleventh Amendment

In their motion for summary judgment, the Defendants first argue that the claims against them in their official capacities are barred by the Eleventh Amendment.

The Defendants correctly state that a federal claim against a state employee in his official capacity is the equivalent of a claim made against the state. *Monnell v. New York City Department of Social Services*, 436 U.S. 658, 690 N.55, 98 S.Ct. 2018 (1978). Unless the state waives its immunity, the Eleventh Amendment bars the

recovery of monetary damages for a claim against an official in his official capacity. *Oliver v. Scott*, 276 F.3d 736, 742 (5th Cir.2002) The Eleventh Amendment does not bar, however, a claim for prospective injunctive relief. *Ganther v. Ingle*, 75 F.3d 207, 210 (5th Cir. 1996) (citing *Ex Parte Young*, 209 U.S. 123, 149, 28 S.Ct. 441, 449-50 (1908)). A plaintiff may seek to enjoin allegedly wrongful acts by a state official because illegal acts by a state official are not acts by the state, as the state could not be considered to have authorized or ratified such acts. *Brennan v. Stewart*, 834 F.2d 1248, 1253 (5th Cir. 1988). The federal court therefore has jurisdiction over equitable claims against state employees being sued in their official capacities, but not claims seeking retrospective monetary relief. *Id.* As such, the Plaintiffs are barred by the Eleventh Amendment from seeking monetary damages against the Defendants in their official capacities, but the Eleventh Amendment does not bar them from seeking injunctive relief. The Plaintiffs' request for injunctive relief is discussed below.

Qualified Immunity

The Defendants next assert that they are entitled to qualified immunity for the claims against them in their individual capacities brought pursuant to 42 U.S.C. § 1983. Qualified immunity is intended to shield government officials from liability for monetary damages for acts in the performance of discretionary functions that were objectively reasonable in light of clearly established law. *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 2738 (1982); *Thompson v. Upshur County*, 245 F.3d 447, 456 (5th Cir.2001). In deciding whether a plaintiffs allegations

are sufficient to overcome the defense of qualified immunity asserted in a motion for summary judgment, a court must determine whether the plaintiff has alleged a violation of a clearly established constitutional right and, if so, whether the defendant's conduct was objectively reasonable under the circumstances. *Bake v. Putnal*, 75 F.3d 190, 198 (5th Cir.1996). In other words, the doctrine of qualified immunity will protect "all but the plainly incompetent or those who knowingly violate the law." *Id.* (*citing Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 1096 (1986)).

"[W]hen the defendant moves for summary judgment based on qualified immunity, it is the plaintiffs burden to demonstrate that all reasonable officials similarly situated would have then known that the alleged acts of the defendants violated the United States Constitution." *Thompson v. Upshur County, TX*, 245 F.3d 447, 460 (5th Cir.2001). The Plaintiffs' § 1983 claims are that the Defendants showed deliberate indifference to Rios' safety because they knew about prior assaults, yet failed to take routine safety precautions in administrative segregation, such as having two guards escort inmates, searching for contraband randomly and frequently, and checking door tracks for damage. The Plaintiffs also argue that the Defendants knowingly placed Rios on a cell block with a rival gang member.

The Eighth Amendment affords prisoners some protection against injury at the hands of other inmates. *Smith v. Wade*, 461 U.S. 30 (1983); *Johnston v. Lucas*, 786 F.2d 1254, 1259 (5th Cir. 1986). There is no place for gratuitously allowing a prisoner to beat another prisoner, as it serves no legitimate penological objective. *Hudson v. Palmer*, 468 U.S. 517, 548, 104 S.Ct. 3194, 3211 (1984). "It is not, however, every injury suffered by one prisoner at

the hands of another that translates into constitutional liability for prison officials responsible for the victim's safety." *Farmer v. Brennan*, 511 U.S. 825, 834, 114 S.Ct. 1970, 1977 (1994). Instead, the standard to employ is whether prison officials were "deliberately indifferent" to the safety needs of an inmate. *Id.*; *Reeves v. Collins*, 27 F.3d 174, 176 (5th Cir. 1994). "[A] prison official cannot be found liable under the Eighth Amendment . . . unless the official knows of and disregards an excessive risk to inmate health or safety; . . . the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.* at 837. "[A]lthough Eighth Amendment claimant need not show that a prison official acted believing that harm would befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm." *Id.* at 842. Under exceptional circumstances, a prison official's knowledge of a substantial risk of harm may be inferred by the obviousness of the substantial risk. *Id.* at 843 n. 8. The prison official must have a sufficiently culpable state of mind for his actions to amount to cruel and unusual punishment. *Wilson v. Setter*, 501 U.S. 294, 111 S.Ct. 2321 (1991). The only Defendant named by the Plaintiffs that was personally involved in the stabbing incident is Officer Sippel. The Plaintiffs complain that Office Sippel failed to protect Rios and allowed Lara to stab Rios by running away from the scene when the attack started. The Plaintiffs do not point to any case law suggesting that an unarmed correctional officer has a constitutional duty to immediately intervene when an armed inmate suddenly attacks another inmate. On the contrary, several courts have determined that there is no such constitutional duty because the officer may need to call for backup or may

seek to avoid his own serious injury, and that the failure to physically intervene in a prison fight does not amount to deliberate indifference. See, e.g., *Patmon v. Parker*, 3 Fed.Appx. 337 (6th Cir.2001); *Winfield v. Bass*, 106 F.3d 525 (4th Cir.1997); *MacKay v. Farnsworth*, 48 F.3d 491 (10th Cir.1995); *Prosser v. Ross*, 70 F.3d 1005 (8th Cir.1995); *Arnold v. Jones*, 891 F.2d 1370 (8* Cir.1989); *Payne v. Collins*, 986 F.Supp. 1036 (E.D. Tex. June 25, 1997). The Plaintiffs have not shown that Officer Sippel's response was a violation of clearly established law. She is therefore entitled to qualified immunity on his claim.

The Plaintiffs offer little more than speculation to support these claims. With regard to training, the Plaintiffs do not offer any evidence of what training was provided for correctional officers working in administrative segregation at the Coffield Unit at the time of the incident; nor do they explain how additional training would have changed the outcome. Moreover, there is no evidence as to which defendant played a role in establishing training policies for correctional officers at the Coffield Unit. Even if the Plaintiffs provided proof that Officer Sippel was not properly trained, a failure to train claim mustte based upon a pattern of similar incidents. *Brown v. Bryan*, OK, 219 F.3d 450 (5th Cir.2000). To this end, the Plaintiffs provide a transcript from a *Spears* hearing for a § 1983 case filed by an inmate in 1999 in the Southern District of Texas, Corpus Christi Division. That case involved an inmate named Giro Cid Adames who was confined in administrative segregation at the McConnell Unit and was stabbed by an inmate while being escorted to his cell in 1997. Evidence of one inmate who was housed at a different unit and was also stabbed by an inmate in administrative segregation falls short of establishing a pattern.

The Plaintiffs also rely on Adames' *Spears* hearing testimony to show that it was "the standard" in TDCJ-ID, before the incident involving Rios, to have two correctional officers escort an administrative segregation inmate to the shower. The Plaintiffs therefore argue that administrative segregation on the Coffield Unit was under-staffed at the time of Rios' death because only one officer escorted him to the shower. Adames did not point to a specific written policy to that effect; rather he testified that it was his belief that there was a policy for two officers with riot batons to escort administrative segregation inmates to and from the shower at the McConnell Unit.[3] This testimony is not sufficient to show that TDCJ had a policy requiring administrative segregation inmates to be escorted by two officers with riot batons. Further, there is no evidence provided by the Plaintiffs to show which, if any, of the Defendants made decisions concerning how many officers are needed to escort inmates and what weapons or protective gear should be used. In other words, assuming the Plaintiffs are correct that TDCJ had a policy of requiring two officers to escort administrative segregation inmates, there is no evidence showing who made the decision on the date of the incident in question that only one officer would be used to escort Rios. The Plaintiffs have not come forward with competent summary judgment evidence to show any of the named Defendants was involved in deciding, with knowledge of a substantial risk of serious harm, to under-staff Rios' wing.

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[3] Adames complained, that, although he was escorted by two officers at the time he was attacked, the officers did not have riot batons.

The Plaintiffs attached a preliminary report from their expert witness, Thomas Rosazza, to their response. While Rosazza cites articles he has written and cases for which he has provided testimony, he does not detail his education or training that would make him an expert in the field of correctional management and custodial care. Rosazza opines that staffing on Rios' unit was inadequate to protect prisoners, in that two officers should be used to escort administrative segregation inmates to provide for better security and to deter attacks. Rosazza further states that there should be frequent searches of cells and door tracks and that inspections on Rios' unit were inadequate. Rosazza's report is unpersuasive, however, both because he does not provide a sufficient foundation for his qualification as an expert and because he does not provide a sufficient foundation for his opinions. His conclusion that the Coffield Unit's policies regarding staffing and cell searches are inadequate is based primarily upon the Plaintiffs' allegations and statements from two inmates concerning how often their cells were searched.

Regardless of whether the Plaintiffs believe that Rios' death could have been avoided if two officers were escorting him that day or if Officer Sippel had intervened instead of running away to call for help, to succeed on a § 1983 claim against these supervisory prison officials, the Plaintiffs must prove each defendant's individual acts of deliberate indifference. The Plaintiffs have not provided evidence showing what role any of the defendants played in making decisions concerning staffing, cell searches or training. It is not at all clear from the evidence provided what the official policy was at the time of the incident, who created the policy or who made decisions concerning how many officers were needed to escort administrative

segregation inmates and what procedures needed to be followed concerning cell searches. To be sure, a tragedy occurred at the Coffield Unit on March 16, 2000. The Defendants are not liable, however, merely because they were supervisors in the prison system on that day. There must be some affirmative evidence of their deliberate indifference. The Plaintiffs have not alleged facts showing that the supervisory Defendants violated a clearly established constitutional right. They are therefore entitled to qualified immunity.

For these same reasons, the Plaintiffs have not alleged facts showing a basis for injunctive relief and the Defendants are entitled to summary judgment on the claims against them in their official capacities for injunctive relief.

Pendent State-Law Claims

As discussed above, the undersigned finds that the Defendants should be granted summary judgment on each of the Plaintiffs' federal claims. The remaining claims are the Plaintiffs state law claims of wrongful death, negligence and gross negligence and a state law claim pursuant to the Texas Tort Claims Act. Pursuant to 28 U.S.C. § 1367(c)(3), federal courts may decline to exercise supplemental jurisdiction over state law claims when the claims forming the basis of federal jurisdiction have been dismissed. The Plaintiffs' remaining state law claims should be dismissed without prejudice so that the Plaintiffs may pursue them in the appropriate state court. See, e.g., *Rhyne v. Henderson County*, 973 F.2d 386 (5th Cir. 1992).

Based on the foregoing, the Court finds that there are no genuine issues of material fact and that the Defendants are entitled to judgment as a matter of law. The Plaintiffs' federal claims should be dismissed with prejudice and the state law claims should be dismissed without prejudice.

Recommendation

In light of the foregoing, it is recommended that the Defendants' Motion for Summary Judgment (docket #35) be granted as to the Plaintiffs' federal claims. It is further recommended that the Court decline to exercise supplemental jurisdiction over the remaining state law claims and that they be dismissed without prejudice.

Within ten (10) days after receipt of the magistrate judge's report, any party may serve and file written objections to the findings and recommendations of the magistrate judge.

A party's failure to file written objections to the findings, conclusions and recommendations contained in this Report within ten days after service shall bar that party from *de novo* review by the district judge of those findings, conclusions and recommendations and, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted and adopted by the district court. *Douglass v. United Services Auto. Assn.*, 79 F.3d 1415, 1430 (5th Cir. 1996) (en banc).

SIGNED this *28th* day of May, 2003.

JUDITH GUTHRIE
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

JOSHUA RIOS, ET AL.

v.

DOYLE WAYNE S

CIVIL ACTION NO. 6:02cv413

FINAL JUDGMENT

(Filed July 28, 2003)

The above-entitled civil action has come before the Court for consideration, and decision having been duly rendered, it is hereby **ORDERED** and **ADJUDGED** that the above-entitled action be **DISMISSED**.

SIGNED this 28th day of July, 2003.

/s/ William M. Steger
WILLIAM M. STEGER
UNITED STATES
DISTRICT JUDGE

(2)

Supreme Court, U.S.
FILED
JUN 22 2005
OFFICE OF THE CLERK

No. 04-1270

In the Supreme Court of the United States

JOSHUA RIOS AND MARY CANALES,
Petitioners,

v.

DOYLE WAYNE SCOTT, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE; GARY JOHNSON, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE; JANE CATHERINE COCKRELL, INDIVIDUALLY AND IN HER CAPACITY AS DIRECTOR OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE; LESLIE WOODS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS REGION II DIRECTOR OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE; ROY A. GARCIA, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SENIOR WARDEN OF THE COFFIELD UNIT OF THE INSTITUTIONAL DIVISION OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE; AND PATTI SIPPEL,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does the Eighth Amendment require an isolated prison guard to immediately insert herself in the confrontation between an armed inmate who has escaped from his cell and an unarmed prisoner who is handcuffed while being transported through the prison hallways, and, if so, was such a right clearly established before March 16, 2000?

2. As to Petitioners' claims against the prison supervisors, did Petitioners offer sufficient evidence to satisfy their burden to overcome a qualified-immunity defense?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Authorities iv

Statement of the Case 2

Course of Proceedings and Disposition Below 2

Statement of Facts 2

Summary of the Argument 3

Reasons to Deny Review 4

I. There is no split about whether a correctional officer must put herself in unreasonable physical danger in order to intervene against an armed inmate. 4

II. This case does not present the question of whether officials must know of threats against a specific inmate. 7

A. The Fifth Circuit's decision did not turn on-indeed, did not even refer to-any concept that officials would need to know about risks to the specific inmate. 7

B. The Court of Appeal's decision is not in conflict with other circuits or this court's precedent. 8

C. The Fifth Circuit's evaluation of the evidence does not warrant review. 9

Conclusion 13

TABLE OF AUTHORITIES

Cases: *Page*

Adames v. Perez,
331 F.3d 508 (5th Cir. 2003) 11

Anderson v. Creighton,
483 U.S. 635, 638 (1987) 4

Bell v. Wolfish,
441 U.S. 520, 547, 99 S. Ct. 1861, 1878 (1979) 5

Board of County Commissioners of Bryan County, Oklahoma v. Brown, 520 U.S. 409 (1997) 11

Edmond v. Eaves,
70 Fed. Appx. 159, 160 (5th Cir. 2003) 8

El-Mumit v. Foster, 232 F.23d 207 (table),
2000 WL 1272453, at *1 (5th Cir. 2000) 8

Farmer v. Brennan,
511 U.S. 825, 835-36 (1994) 6,8,10

Grandstaff v. City of Borger, 767 F.2d 161, 169-170
(5th Cir. 1985) *cert. denied* 480 U.S. 916 (1987) 10

Hale v. Tallapoosa County,
50 F.3d 1579, 1583 (11th Cir. 1995) 9

Hernandez v. Tex. Dep't of Prot. and Regulatory Servs.,
380 F.3d 872, 881-882 (Tex. 2004) 8

Hopkins v. Stice,
916 F.2d 1029, 1030-31 (5th Cir. 1990) 6

Hudson v. Palmer,
468 U.S. 517, 526 (1984) 6

Jacquez v. Procunier,
801 F.2d 789, 793 (5th Cir. 1986) 10

MacKay v. Farnsworth,
48 F.3d 491(10th Cir. 1995) 5

Mouille v. City of Live Oak,
977 F.2d 924, 929 (5th Cir. 1992) 10

Odom v. South Carolina Dept. Of Corrections,
349 F.3d 765 (4th Cir. 2003) 5

Peate v. McCann,
294 F.3d 879(7th Cir. 2002) 5

Prosser v. Ross,
70 F.3d 1005, 1008 (8th Cir. 1995) 5

Rios, et al. v. Scott, et al.,
No. 03-41088, 100 Fed.Appx. 270 (5th Cir. 2004). 2

Siegert v. Gilley,
500 U.S. 226, 232 (1991) 4

No. 04-1270

In the Supreme Court of the United States

JOSHUA RIOS AND MARY CANALES,
Petitioners,

v.

DOYLE WAYNE SCOTT, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE; GARY JOHNSON, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE; JANE CATHERINE COCKRELL, INDIVIDUALLY AND IN HER CAPACITY AS DIRECTOR OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE; LESLIE WOODS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS REGION II DIRECTOR OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE; ROY A. GARCIA, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SENIOR WARDEN OF THE COFFIELD UNIT OF THE INSTITUTIONAL DIVISION OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE; AND PATTI SIPPEL,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Of the two questions offered by Petitioners, the first is over-determined on these facts and the second is not fairly presented. First, the Constitution does not create a mandatory, *per se* duty for a solitary correctional officer to put at risk their own life to stop a sudden violent attack rather than seeking the assistance of other officers. Second, in the guise of suggesting that the Fifth Circuit misapplied the law, Petitioners merely ask this Court to second-

guess the evidentiary judgments that were made by the district court and affirmed on appeal.

STATEMENT OF THE CASE

Course of Proceedings and Disposition Below

Petitioners challenge an unpublished *per curium* decision of the Fifth Circuit that affirmed summary judgment for the Respondents on the grounds of qualified immunity. Petitioners, who are the family members of a deceased inmate, brought claims including claims for money damages under 42 U.S.C. §1983. (App.5)[1] After Respondents moved for summary judgment on the question of qualified immunity, and after the Magistrate Judge recommended that the motion for summary judgment be granted, (App.28-29), the district court rendered judgment in favor of the Respondents on July 28, 2003 (App.30).

On June 3, 2004, the Court of Appeals for the Fifth Circuit affirmed in a decision joined by Chief Judge King, Judge Reavley, and Judge Garza. *Rios, et al. v. Scott, et al.*, No. 03-41088, 100 Fed.Appx. 270 (5th Cir. 2004).

Statement of Facts

On March 16, 2000, correctional officer Patti Sippel was escorting a handcuffed inmate from the shower area to his cell on another floor, both of which were part of the prison's administrative segregation unit. (App.45.) While transporting the inmate, Officer Sippel was carrying a baton but no other weapons. (App2.) She was escorting inmate Rolando Rios, who was a known member of a prison gang. (App.2.) The inmate was handcuffed to minimize the safety risk that he would pose to the escorting officer. (App.5.)

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1. Cites to "ROA" refer to the appellate record in the Fifth Circuit. Cites to "App" refer to the appendix to the petition for review.

As Officer Sippel was escorting Rios to the landing of the stairwell to his floor, they were jumped by an escaped inmate armed with a sharpened metal weapon of the type known as a "shank." (App.5.) The escaped inmate, Antonio Lara, stabbed Rios in the back, repeatedly and quickly. (App.5.) When Officer Sippel assessed the situation, she fled from the armed inmate to seek assistance. (App.5.) That assistance came, but the wounds inflicted by Lara were fatal, as Rios later died after receiving medical attention. (App.5.)

Lara had broken out of his cell, which was on the same floor as the attack. (App.5.) Before breaking out and attacking Rios, Lara had been under monitoring as a potential member of a prison gang, but it had not yet been confirmed that he was a member. (App.2.)

SUMMARY OF THE ARGUMENT

Neither of the questions presented warrants review by this Court. First, there is no absolute constitutional duty requiring a correctional officer to risk her own life rather than retreating to seek appropriate backup. It is eminently reasonable for such an officer to seek help rather than to unilaterally intervene, putting her own life at risk by attempting to personally overpower an armed, escaped inmate who is in the midst of a violent attack. Quite unsurprisingly, there is no dispute among the Circuits on this common-sense principle of law.

Second, the record in this case does not support Petitioners' claim that the prison supervisors were deliberately indifferent. The Fifth Circuit examined the snippets of testimony and other evidence offered by Petitioners—which make up the bulk of their petition to this Court—and rightly concluded that, "[h]ere, there was no evidence that the supervisory officials were deliberately indifferent to inadequate staffing, cell searches, training or potential gang conflict." (App.6) This is a dispute about facts, not law, and there is no need for this Court's intervention against an unpublished *per*

curium decision applying well-settled law to an unusual set of facts. The writ should accordingly be denied.

REASONS TO DENY REVIEW

I. THERE IS NO SPLIT ABOUT WHETHER A CORRECTIONAL OFFICER MUST PUT HERSELF IN UNREASONABLE PHYSICAL DANGER IN ORDER TO INTERVENE AGAINST AN ARMED INMATE.

In order to avoid summary judgment on their claims against Officer Patti Sippel—the only officer who was personally escorting Rios when an escaped, armed inmate attacked—Petitioners were required to establish that no reasonable officer in her position could have, consistent with the Constitution, sought help instead of immediately intervening.

This is because qualified immunity protects government officials from certain claims brought pursuant to §1983. *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). To overcome the defense of qualified immunity, plaintiffs must first must show that the plaintiff has alleged a violation of a clearly established constitutional right. *Siegert v. Gilley*, 500 U.S. 226, 232 (1991). Once plaintiffs have overcome the first prong of the analysis, they must introduce sufficient evidence that the defendant's conduct was objectively reasonable. *Siegert*, 500 U.S. at 232.

The district court examined the summary-judgment record before it and held that there was no constitutional duty for Officer Sippel to immediately intervene to stop this attack. (App.21-22) The Fifth Circuit affirmed, holding that "the [Petitioners] could not meet their burden to demonstrate that all reasonable officers similarly situated would have then known that the failure to intervene violated the Constitution." (App.5-6)

The Fifth Circuit's refusal to retroactively impose an absolute duty to intervene—especially where an isolated officer would have been subjecting herself to great physical danger—comports perfectly with the decisions of other Circuits and with this Court's guidance.

In cases presenting similar facts, other Circuits have reached similar results. In a case in which a prison guard reacted by seeking help rather than individually trying to break up a fight, the Eighth Circuit held that "prison guards have no constitutional duty to intervene in the armed assault of one inmate upon another when intervention would place the guards in danger of physical harm." *Prosser v. Ross*, 70 F.3d 1005, 1008 (8th Cir. 1995). The Fourth Circuit has agreed that "such heroic measures are not constitutionally required." *Winfield v. Bass*, 106 F.3d 525, 532 (4th Cir. 1997) (en banc). See also *Odom v. South Carolina Dept. Of Corrections*, 349 F.3d 765 (4th Cir. 2003); *Peate v. McCann*, 294 F.3d 879 (7th Cir. 2002); *MacKay v. Farnsworth*, 48 F.3d 491(10th Cir. 1995).

This Court has also recognized the uniquely difficult task facing prison officers. The day to day problems arising in the operation of a prison are not susceptible of easy solutions. *Bell v. Wolfish*, 441 U.S. 520, 547, 99 S. Ct. 1861, 1878 (1979). Prison administrators are accorded a great deal of deference "in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Id.* In part, this is because of the danger facing all prison staff:

> Prisons, by definition, are places of involuntary confinement of persons who have a demonstrated proclivity for antisocial criminal and often violent, conduct. Inmates have necessarily shown a lapse in ability to control and conform their behavior to the

> legitimate standards of society by the normal impulses of self-restraint; they have shown an inability to regulate their conduct in a way that reflects either a respect for law or an appreciation of the rights of others.

Hudson v. Palmer, 468 U.S. 517, 526 (1984). Within that context, the Court has recognized that certain situations can arise in which "the decisions of prison officials are typically made 'in haste, under pressure, and without the luxury of a second chance,'" carving for those cases involving excessive force a special, higher standard of culpability than mere deliberate indifference. *Farmer v. Brennan*, 511 U.S. 825, 835-36 (1994). Although the accusation against Officer Sippel is somewhat different—it is that she did not use enough force—there is no doubt that the haste and pressure confronting her were of the same, if not greater, dimension.

Although Respondents would contend that there is still no such absolute constitutional duty to intervene in the unusual circumstances offered by this case, at the very least the precedents of other Circuits bolster the Fifth Circuit's holding that such a right would not have been well-established at the time of this attack. To overcome qualified immunity, "the contours of the right allegedly violated [must be] sufficiently clear that a reasonable official would understand that what he or she was doing violated that right." *Anderson*, 483 U.S. at 640. Thus,"[a]n official enjoys qualified immunity if a reasonable official would be left uncertain of the application of the standard to the facts confronting him." *Hopkins v. Stice*, 916 F.2d 1029, 1030-31 (5th Cir. 1990). Accordingly, Officer Sippel is entitled to qualified immunity and the Fifth Circuit correctly affirmed the dismissal of these claims against her.

II. THIS CASE DOES NOT PRESENT THE QUESTION OF WHETHER OFFICIALS MUST KNOW OF THREATS AGAINST A SPECIFIC INMATE.

Petitioners also claim that the supervisors of the prison were deliberately indifferent so as to permit Lara's attack on Rios. Petitioners accuse the Fifth Circuit of disagreeing "with the . . . holding that a risk of violence specific to the inmate/plaintiff is not required." (Pet.13). Petitioners argue that such a rule would conflict with precedent and other Circuits. But this case does not present the question. Indeed, the Fifth Circuit did *not* apply any such rule, instead concluding that the evidence here was simply insufficient. Confirming that, other Fifth Circuit precedent—including a more recent, *published* opinion—make clear that the Fifth Circuit does not disagree with the decisions Petitioners cite as purported conflicts. Petitioners' disagreement with the Fifth Circuit is merely an evidentiary dispute that does not implicate this legal rule.

A. The Fifth Circuit's Decision Did Not Turn On—Indeed, Did Not Even Refer to—Any Concept That Officials Would Need to Know About Risks to the Specific Inmate.

The Fifth Circuit decision that the prison supervisors were not deliberately indifferent was based on its evaluation of the record, not on any purported rule that a risk to the specific inmate must have been shown. The court did not suggest that it was making any distinction whatsoever about whether the officials knew about risks to inmates in general or to Rios in particular. Rather, it concluded that "there was no evidence that the supervisory officials were deliberately indifferent to inadequate staffing, cell searches, training or potential gang conflict." (App.3).

B. The Court of Appeals's Decision Is Not In Conflict With Other Circuits or This Court's Precedent.

The petition claims that the Fifth Circuit has failed to follow *Farmer v. Brennan*, 511 U.S. 825 (1994), *see* Pet.12, suggesting that the court improperly would require plaintiffs to show that the prison officials knew of some risk unique to a particular plaintiff rather than a more generalized risk. But the Fifth Circuit follows *Farmer v. Brennan*, as is made plain by its citation to that case for the controlling legal principle. (App.3).

Indeed, the Fifth Circuit has expressly relied on this aspect of *Farmer v. Brennan* in a published decision issued after the decision in this case. *Hernandez v. Tex. Dep't of Prot. and Regulatory Servs.*, 380 F.3d 872, 881-882 (Tex. 2004) ("a prison official may not escape liability for deliberate indifference by showing that . . . he did not know that the complainant was especially likely to be assaulted by a specific prisoner") (citing *Farmer*, 511 U.S. at 843)). If the unpublished *per curium* decision in the present case had created any doubt—unlikely both because of its silence on this question and the local circuit rule making unpublished decisions non-precedential, *see* FIFTH CIR. R. 47.5.4—this more recent express statement of the Circuit should allay any concern that there could be conflict over this point.[2]

For much the same reasons, the petition is wrong to assert that the Fifth Circuit is in conflict with the Sixth Circuit and the Eleventh Circuit on this issue. The cases cited by petitioner merely restate the *Farmer* rule that there is no need to show evidence of a risk specific to a particular inmate. *Street v. Corrections Corp. of*

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2. Unpublished decisions from the Fifth Circuit have also continued to expressly follow this rule. *See Edmond v. Eaves*, 70 Fed. Appx. 159, 160 (5th Cir. 2003) (per curium) (unpublished); *El-Mumit v. Foster*, 232 F.23d 207 (table), 2000 WL 1272453, at *1 (5th Cir. 2000) (per curium) (unpublished).

Am., 102 F.3d 810, 817 (6th Cir. 1996); *Hale v. Tallapoosa County*, 50 F.3d 1579, 1583 (11th Cir. 1995). The Fifth Circuit agrees with that rule. The only divergence is the result that each court reached when evaluating the particular summary judgment record before it, and there is no need for this Court to re-weigh the evidence evaluated by the district court and affirmed by the court of appeals.

C. The Fifth Circuit's Evaluation of the Evidence Does Not Warrant Review.

The Fifth Circuit concluded that the evidence offered by Petitioners did not meet their burden. (App.3) That evaluation was reasonable and does not warrant this Court's review.

For example, Petitioners place great reliance on the testimony of their purported expert, Thomas A. Rosazza, in an attempt to meet the deliberate indifference standard. (Pet.6). Yet, the district court concluded that Rosazza's specific conclusions were unfounded and that he had failed to established his qualifications to even offer such opinions. (App.15) It is quite understandable that the Fifth Circuit did not rely on this unqualified, unfounded testimony as sufficient evidence that the supervisory officials were deliberately indifferent. Nor should this Court pla e undue reliance those unqualified, unfounded conclusions.

Mr. Rosazza fails to detail his education or training that would qualify him as an expert. (App.15) Furthermore, Mr. Rosazza fails to provide any foundations for his opinion. (App.15) He simply bases his conclusions on the Petitioners' allegations and statements from two inmates, which is insufficient. (App.15).

The fact that an incident happened cannot be enough to establish culpability under §1983, a type of claim aimed at individuals. In *Farmer*, this Court required both an objective and a subjective component of *mens rea* in order to establish the deliberate indifference that would lead to an Eighth Amendment

violation. *Farmer*, 511 U.S. at 834. The offender must first show the alleged deprivation to be objectively and sufficiently serious—that he is "incarcerated under conditions posing a substantial risk of serious harm." *Farmer*, 511 U.S. at 834, 114 S. Ct. at 1977. He must then show a "sufficiently culpable state of mind." *Id.* The plaintiff must demonstrate that the defendant prison official had a *mens rea* equivalent to that required for criminal recklessness—that the official knew of and disregarded an excessive risk to inmate health or safety. *Farmer*, 511 U.S. at 837, 114 S. Ct. at 1979. "[T]he official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.*

Accordingly, supervisors cannot be held liable under § 1983 simply because they are supervisors. *Jacquez v. Procunier*, 801 F.2d 789, 793 (5th Cir. 1986). For a supervisor to be held liable, he must participate in the acts found to be unconstitutional or implement unconstitutional policies that cause the alleged constitutional violation. *Mouille v. City of Live Oak*, 977 F.2d 924, 929 (5th Cir. 1992) citing *Grandstaff v. City of Borger*, 767 F.2d 161, 169-170 (5th Cir. 1985) *cert. denied* 480 U.S. 916 (1987). Petitioners failed to present any evidence that the individual supervisors that they sued engaged in any unconstitutional acts or set any unconstitutional policies that were causally related to Petitioners' injury.

Petitioners argue that the prisoner supervisors are liable because of inadequate staffing, searches, training, and gang conflict. (ROA pp. 144-146). In making these charges, Petitioners place great reliance on the after-the-fact investigation, which was recorded in a Serious Incident Review. This after-the-fact investigation does not demonstrate the *prior* mental awareness necessary to overcome a qualified immunity defense.

Nothing in the Serious Incident Review indicates that there was inadequate training or that the training of the correctional officers working at the Coffield Unit was either the direct or indirect cause of Rios's death.[3] (ROA pp. 416-428).

Nor does anything in the Serious Incident Report indicate that inadequate staffing was either the direct or indirect cause of death of Rios. Indeed, the Serious Incident Report concludes that the wing where the incident occurred was staffed as required (ROA p. 425). Nor does the Serious Incident Report fails to state that two officers were to have escorted Rios to and from the shower as alleged by the Petitioners. Only level 2 and 3 offenders required two correctional officers to escort them to and from the shower (ROA p. 422). Rios was classified as a level 1 offender (ROA p. 420). The Serious Incident Report stated that one correctional officer may escort a level 1 offender (ROA p. 423).

And nothing in the Serious Incident Report indicates that inadequate searches were either the direct or indirect cause of the death of Rios (ROA 416-428). While the Serious Incident Report

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3. Petitioners also failed to show a pattern of similar incidents. *Board of County Commissioners of Bryan County, Oklahoma v. Brown*, 520 U.S. 409 (1997). The only evidence they offered in the district court was the transcript from a hearing in the case of *Adames v. Perez*, United States District Court for the Southern District of Texas, Corpus Christi Division, Civil Action No. C-99-437 (ROA pp. 231-251). Here, the magistrate considered that evidence and concluded it insufficient. (App.13) Indeed, in *Adames* the Fifth Circuit ultimately vacated and remanded the case back to district court for further proceedings, finding that a judgment against the defendant TDCJ supervisory officials resulted in a manifest miscarriage of justice. *Adames v. Perez*, 331 F.3d 508 (5th Cir. 2003). In the remand of that case, the District Court granted summary judgment on August 30, 2004, in favor of the prison officials, finding that they were not deliberately indifferent and were entitled to qualified immunity. That single hearing transcript hardly shows a sufficient pattern of similar incidents.

does indicate that the attacker's cell was not searched for 11 days prior to the attack and that the policy regarding searches of cells, recreation yards and showers was not being followed to the letter (ROA p. 422), there is nothing in the Serious Incident Report to indicate that the supervisory Respondents played a role in making decisions that would constitute deliberate indifference concerning the search procedures followed at the Coffield Unit (ROA 416-428). Consequently, there is nothing in the Serious Incident Report which would provide evidence of deliberate indifference by the supervisory defendants with regards to cell searches.

Lastly, Defendants-Appellants allege that Rios and Lara should not have been housed in the same area as they were both gang members. However, nothing in the Serious Incident Report indicates that the supervisory officials knew of a potential gang conflict between Rios and Lara and, thus, nothing suggests that any reshuffling of prisoners to lessen gang conflict would necessarily have separated Rios and Lara. While Rios was a confirmed gang member (ROA p. 254), Lara was not a confirmed gang member at the time of the attack (ROA p. 254).

There is no reason for this Court to revisit the evidentiary judgments made by the Fifth Circuit in applying well-settled law.

CONCLUSION

Respondents respectfully request that the Court deny the petition for writ of certiorari.

Respectfully submitted,

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